STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 12, 2011
v	No. 296524 Dickinson Circuit Court
PAUL JOSEPH KLECZKA, Defendant-Appellant.	LC No. 08-004122-FH

Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

The Dickinson County Prosecutor charged defendant Paul Joseph Kleczka with two crimes arising from a November 2008 traffic stop in Norway: operating a vehicle while intoxicated (OWI), third offense, MCL 257.625(1), (9), and possession of marijuana, MCL 333.7403(2)(d). Defendant pleaded guilty of the marijuana possession count, and a jury convicted him of the OWI charge. The trial court sentenced defendant to concurrent terms of 11 months in jail for each offense. Defendant appeals as of right, and we affirm.

Michigan State Police Trooper John Flitton recounted at trial his traffic stop of a pickup driven by defendant shortly after midnight on the cold but clear morning of November 5, 2008. Flitton recalled that he first noticed the pickup driving on US-2 traveling "[a]t least 15 miles an hour below the posted speed limit." Flitton explained that he turned around to follow the pickup because at "[t]hat time of the day, . . . drunk drivers normally will travel slowly." While Flitton's patrol car followed, the pickup maintained its rate of travel between 15 and 20 miles per hour below the posted speed limits, made two unnecessary or unprompted lane changes, then turned right. Flitton described that "it was a wide sweeping turn into the oncoming lane, and then he stayed in the oncoming lane as he made his curve around onto Scenic [Drive] there." At that point, Flitton pulled over the pickup.

Flitton testified that after he approached the driver's side of the pickup and defendant lowered the window, Flitton smelled "a strong odor of intoxicants coming from the passenger

compartment,"[1] and noticed that defendant's "eyes were red and watery" and he spoke in a slurred fashion. According to Flitton, defendant, a resident of Wisconsin, had trouble locating his driver's license and remained "very adamant about telling [Flitton] that" "[h]e thought he was in the State of Wisconsin," even after Flitton drew defendant's attention to the State of Michigan seals on his uniform and patrol car. Defendant eventually walked to the rear of the pickup in an unsteady manner, and Flitton administered four field sobriety tests, all of which defendant failed.

Because Flitton felt defendant "was highly intoxicated," he arrested defendant and took him to a local emergency room, where defendant agreed to provide a blood sample for testing. Flitton watched a nurse obtain samples of defendant's blood in an otherwise unoccupied area of the emergency room, took the samples back to the police post, and mailed them to a laboratory for testing at the end of his shift. A state police forensic scientist testified that his testing of defendant's blood samples identified a blood-alcohol level of "0.20 grams alcohol per 100 milliliters blood." Defendant insisted at trial that he had imbibed only one or two beers over the course of the evening before the traffic stop, and that he had little difficulty with the field sobriety tests.

Defendant first contests on appeal the trial court's denial of his motion to appoint an expert who could confirm the defense position that the blood tested for alcohol did not belong to him. "This Court reviews a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert [under MCL 775.15] for an abuse of discretion." *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). An abuse of discretion occurs only when a trial court makes a decision that falls outside the range of reasonable and principled outcomes. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

> As MCL 775.15[2] makes clear, a trial court is not compelled to provide funds for the appointment of an expert on demand. In *People v Jacobsen*, 448

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[1] During the traffic stop, Flitton's partner investigated the condition of a passenger in the pickup, who was unconscious at the outset of the stop and subsequently was arrested for possessing marijuana.

[2] The full text of MCL 775.15 reads:

> If any person accused of any crime or misdemeanor, and about to be tried therefor in any court of record in this state, shall make it appear to the satisfaction of the judge presiding over the court wherein such trial is to be had, by his own oath, or otherwise, that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial, giving the name and place of residence of such witness, and that such accused person is poor and has not and cannot obtain the means to procure the attendance of such witness at the place of trial, the judge in his discretion may, at a time when the prosecuting officer of the county is present, make an order that a subpoena be issued from such court for such witness in his favor, and that it be served by the proper officer of the court. And it shall be the duty of such officer

> Mich 639, 641; 532 NW2d 838 (1995), this Court held that, to obtain appointment of an expert, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert. It is not enough for the defendant to show a mere possibility of assistance from the requested expert. Without an indication that expert testimony would likely benefit the defense, a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness. [*Tanner*, 469 Mich at 442-443 (internal quotation omitted).]

Defendant filed a pretrial motion for the appointment of an expert in the field of deoxyribonucleic acid (DNA) analysis. In support of the motion, defendant asserted his indigence and, in an affidavit, his position that the blood ultimately tested for alcohol could not have been his because he had "consumed no more than three . . . beers before 11:30 p.m." on November 4, 2008. Defense counsel mentioned her research suggesting that "a person of 160 pounds who had consumed four 12 oz. . . . bottles of beer would have an estimated percentage of alcohol in the blood of 0.094," and concluded, "In the event the DNA does not match, the appointment of the DNA expert would cause the forensics analysis and evaluation of the blood sample presented under cover of this case to be inadmissible at Trial and therefore, substantially support Defendant's innocence."

At an evidentiary hearing, the trial court inquired of defense counsel whether she had located anything apart from defendant's affidavit to substantiate "that . . . the chain of custody broke down and . . . that this blood was not" defendant's, and counsel replied that she possessed "no other information that would indicate that." The trial court then denied the motion for appointment of an expert pursuant to the following logic:

> As the Prosecution rightly points out, . . . it's actually a cliché in these drunk driving cases, "How . . . much alcohol have you consumed, Mr. Defendant?" "Two or three beers," is the standard answer.
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> . . . I told the Defense attorney back at the Preliminary Examination in January that it was going to take more than the Defendant simply believing the test was inaccurate to have this Court incur the expense to appoint a DNA expert. There was going to have to be some independent showing that the chain of custody had broken down, that there was some other reason . . . than the Defendant's opinion that he was not that intoxicated, in order for this Court to even consider appointing an expert. If I did this in every case of drunk driving when it's always contested that the lab results were wrong . . . we could virtually close the courthouse doors because we couldn't afford to run the system.
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> The Prosecution has the burden of proving to the satisfaction of the jury that the chain of custody was intact, that the blood flowed from the Defendant's

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> to serve such subpoena, and of the witness or witnesses named therein to attend the trial, and the officer serving such subpoena shall be paid therefor, and the witness therein named shall be paid for attending such trial, in the same manner as if such witness or witnesses had been subpoenaed in behalf of the people.

> arm to the lab in an unbroken chain, and . . . that the test result is valid.[3] He can certainly challenge the validity of the test results through cross-examining the Prosecution's expert through learned treatises and the like, and if the jury believes the Defendant only had two or three beers, they're going to acquit him. If the jury believes that the blood alcohol testing procedures were valid and reliable and the chain of custody was intact, they're going to convict him. But . . . I am declining the request for . . . an expert under these circumstances.

Defense counsel then orally moved for a postponement of trial to enable defendant to "raise sufficient funds to accommodate the testing on his own," which the trial court also denied.

After reviewing the pertinent portions of the instant record, we conclude that the trial court correctly found that defendant did not supply adequate support for his motion to appoint a DNA expert. Defendant's assertion regarding the amount of alcohol he had drunk before the traffic stop, together with defense counsel's legal research concerning the usual blood-alcohol levels of individuals approximating defendant's size who had consumed up to four alcoholic beverages, added up "to show[, at most,] a mere possibility of assistance from the requested expert." *Carnicom*, 272 Mich App at 617. Defense counsel conceded that she had uncovered no evidence hinting at any concern or problem in the chain of custody tracking the blood vials tested from defendant's arm to the police station, then to the laboratory. Under the circumstances of this case, defendant simply did not demonstrate "that expert testimony *would likely benefit the defense*," and consequently, the trial court did not select an outcome falling outside the range of reasonable and principled outcomes when it denied the defense motion to appoint a DNA expert. *Id*. (emphasis added); see also *Tanner*, 469 Mich at 443.

Nor has defendant shown that the "trial court further deprived [him] of due process when it refused to adjourn the trial until he could obtain the funds for DNA testing." An appellate court also reviews for an abuse of discretion a trial court's ruling whether to grant an adjournment or continuance. *People v Jackson*, 467 Mich 272, 266; 650 NW2d 665 (2002). "To invoke the trial court's discretion to grant a continuance or adjournment, a defendant must show both good cause and diligence." *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003); see also MCR 2.503(C)(1) and (2); *Jackson*, 467 Mich at 276-277. "Good cause factors include whether [the] defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." *Coy*, 258 Mich App at 18 (internal quotation omitted).

As in *Jackson*, 467 Mich at 277, in this case "[t]he trial court did not articulate clearly the basis for its decision to deny a continuance. It did not discuss the requirements of the court rule or explain precisely how . . . [defendant] had failed to satisfy those requirements." In light of the trial court's reference in declining to appoint a DNA expert to the fact that the court and defense

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[3] The prosecutor elicited at trial extensive testimony concerning the chain of custody of defendant's blood samples and state police laboratory protocols for receiving and testing blood samples.

counsel had engaged in discussion about a potential expert witness for the defense several months before the hearing, the trial court potentially accepted the prosecutor's contention that defendant had not timely tried to ascertain a DNA expert. Even were we to assume that the trial court abused its discretion in denying the motion for an adjournment, "the trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion." *Coy*, 258 Mich App at 18-19. Given defendant's failure to substantiate his position that a DNA expert would likely have assisted or benefited the defense, *Tanner*, 469 Mich at 443; *Carnicom*, 272 Mich App at 617, we discern no prejudice flowing to defendant from the trial court's decision to deny an adjournment. *People v Wilson*, 397 Mich 76, 81; 243 NW2d 257 (1976), citing MCL 769.26.

Defendant lastly disputes that the trial court had any statutory authority to impose as a component of his sentence $939.37, representing the amount the county incurred in prosecutorial salary necessitated by defendant's trial. We consider de novo questions of law involved in statutory interpretation. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

> "The rules of statutory construction are well established. The fundamental task of statutory construction is to discover and give effect to the intent of the Legislature. The task of discerning our Legislature's intent begins by examining the language of the statute itself. Where the language of the statute is unambiguous, the plain meaning reflects the Legislature's intent and this Court applies the statute as written. Judicial construction under such circumstances is not permitted." [*Id*. at 702-703, quoting *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999).]

Defendant's appellate argument that he should not have to reimburse "the portion of the salary paid to the prosecutor during the period in which he handled the case" ignores MCL 769.1f. In MCL 769.1f, our Legislature has authorized sentencing courts to impose additional expenses on defendants convicted of specified offenses. At the time of the instant offense and defendant's sentencing, MCL 769.1f provided in relevant part as follows:

> (1) *As part of the sentence for a conviction of any of the following offenses*, in addition to any other penalty authorized by law, *the court may order the person convicted to reimburse* the state or *a local unit of government for expenses incurred in relation to that incident including* but not limited to expenses for an emergency response and *expenses for prosecuting the person*, as provided in this section:
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> (a) *A violation* or attempted violation *of 625(1),* (3), (4), (5), (6), or (7), . . . *of the Michigan vehicle code, 1949 PA 300, MCL 257.625* . . . .
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> * * *
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> (2) The expenses for which reimbursement may be ordered under this section include all of the following:
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> * * *

(d) *The salaries, wages, or other compensation, including, but not limited to, overtime pay of prosecution personnel for time spent investigating and prosecuting the crime or crimes resulting in conviction.*

The language comprising MCL 769.1f(1)(a) and (2)(d) clearly and unambiguously authorized the trial court to include as an element of the sentence for defendant's OWI conviction an order that he reimburse Dickinson County for "*salaries, wages, or other compensation, including, but not limited to, overtime pay of prosecution personnel for time spent investigating and prosecuting the crime*." We therefore conclude that the trial court correctly obligated defendant to pay in this case the $939.37 incurred by Dickinson County in prosecuting him.[4]

Affirmed.

/s/ Amy Ronayne Krause
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher

[4] Our decision does not preclude defendant's ability to contest enforcement of the trial court's reimbursement order on indigency grounds. *People v Jackson*, 483 Mich 271, 292-294; 769 NW2d 630 (2009).